confidential* ***end]** existing customers disconnected their U-verse service due to the lack of Padres programming. *See id.* ¶¶ 24-28 & Ex. 7.

96. This has had a significant impact on AT&T's revenues, and that impact will continue to be felt going forward given the lost customer opportunities. Overall, AT&T estimates that by July 2008, it had lost over **[highly confidential*** ***end]** in present and expected gross revenues due to the lack of Padres programming. *See id.* ¶¶ 31-32 & Ex. 7. And even this assessment is low, since it fails to account for the fact that, over time, AT&T expects its per-customer revenues to climb significantly. If AT&T had adjusted for this phenomenon over the expected life of the customers it has lost due to Cox's withholding, the lost revenue would be even higher than is reflected in AT&T's calculation. *See id.* ¶ 32.

97. And the impact goes beyond U-verse-related revenues. AT&T has found that the ability to offer a meaningful alternative to the cable incumbent not only produces video revenues, but also helps AT&T stem the loss of legacy voice customers that might otherwise migrate to the cable platform. Specifically, offering a meaningful U-verse TV alternative allows AT&T to keep or win back those voice customers who prefer to purchase all their services from one vendor. The cable incumbents initially had a head start on the telephone companies in providing such bundled service offerings, but AT&T now can offer customers a meaningful cable television alternative together with voice and broadband. But if Cox's withholding of Padres programming undermines U-verse TV, AT&T may lose some customers—even legacy voice customers—altogether, and in some cases permanently. The loss thus goes beyond the U-verse business and can be persistent and severe. *See id.* ¶ 33.

98. Only some of these costs are readily quantifiable; yet all are real and have a pernicious effect on AT&T's ability to offer a viable competitive video service in San Diego. AT&T is in the process of modeling the financial impact that Cox's withholding has had on the company in San Diego. However, that process cannot be completed until AT&T's 2008 numbers are finalized. AT&T accordingly reserves the right to, and intends to, amend this Complaint to include a full statement of damages pursuant to 47 C.F.R. § 76.1003(h). In the interim, however, AT&T has filed this Complaint now in light of the urgent and critical need to resolve this Complaint and gain access to Padres programming well before the beginning of next year's baseball season. We urge the Commission to proceed with the merits of this Complaint and to revisit damages at a later date, pursuant to an amended complaint that AT&T intends to file as soon as possible.

XI. REQUEST FOR PENALTIES

99. Cox's repeated, deliberate commission of program access violations with clear anticompetitive intent, and the resulting effect of stifling meaningful competition and choice in the San Diego marketplace, justify the imposition of forfeiture penalties under 47 U.S.C. § 503(b). In the *1998 Implementation Order*, 13 FCC Rcd at 15829 ¶ 9, the Commission identified its forfeiture authority as "an effective deterrent to anti-competitive conduct" that "can be used in appropriate circumstances as an enforcement mechanism for program access violations." The Commission stated that it "intend[ed] to make greater use of [its forfeiture] authority to sanction unlawful conduct." *Id.* The Commission should put this intent into effect to punish Cox for its wrongful, deliberately anticompetitive conduct.

XII. REQUEST FOR RELIEF

For the foregoing reasons, AT&T asks the Commission to grant the following relief:

A. A declaration that Defendant has violated Section 628(b) of the Communications Act, 47 U.S.C. § 548(b), and Section 76.1001 of the Commission's rules by refusing to license Cox-4 San Diego to AT&T;

B. An injunctive order requiring Defendant immediately to negotiate a license agreement with AT&T for Cox-4 San Diego on nondiscriminatory terms and conditions;

C. An order requiring Defendant to pay damages under 47 C.F.R. § 76.1003(h);

D. An order requiring Defendant to pay forfeiture penalties under 47 U.S.C. § 503(b); and

E. An order awarding AT&T all other appropriate relief.

Respectfully submitted,

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October 6, 2008

REDACTED – FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

AT&T SERVICES, INC. AND PACIFIC BELL TELEPHONE COMPANY D/B/A SBC CALIFORNIA D/B/A AT&T CALIFORNIA, Complainants, v. COXCOM, INC., Defendant.	File No. CSR-8066-P

VERIFICATION OF CHRISTOPHER M. HEIMANN

I have read AT&T's Amended Program Access Complaint ("Complaint") in this matter and, pursuant to 47 C.F.R. § 76.6(a)(4), state that, to the best of my knowledge, information, and belief formed after reasonable inquiry, the Complaint is well grounded in fact and is warranted under existing law or a good faith argument for the extension, modification, or reversal of existing law. The Complaint is not interposed for any improper purpose.

Christopher M. Heimann

September 30, 2008

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of October 2008, I caused copies of the foregoing Amended Program Access Complaint (Public Version) with accompanying Declarations of Daniel York and Christopher Sambar to be served by first class mail, postage prepaid, upon the following:

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David Wittenstein
Dow Lohnes PLLC
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Suite 800
Washington, DC 20036-6802

Dileep S. Srihari

Dileep S. Srihari

ATTACHMENT 5

REDACTED – FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

AT&T SERVICES, INC. AND PACIFIC BELL TELEPHONE COMPANY D/B/A SBC CALIFORNIA D/B/A AT&T CALIFORNIA, Complainants, v. COXCOM, INC. Defendant.	File No. CSR-8066-P

FILED/ACCEPTED
NOV 2 1 2008
Federal Communications Commission
Office of the Secretary

REPLY OF AT&T TO ANSWER TO AMENDED PROGRAM ACCESS COMPLAINT

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November 21, 2008

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REDACTED – FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

AT&T SERVICES, INC. AND PACIFIC BELL TELEPHONE COMPANY D/B/A SBC CALIFORNIA D/B/A AT&T CALIFORNIA, Complainants, v. COXCOM, INC. Defendant.	File No. CSR-8066-P

REPLY OF AT&T TO ANSWER
TO AMENDED PROGRAM ACCESS COMPLAINT

AT&T Services, Inc. and Pacific Bell Telephone Company d/b/a/ SBC California d/b/a AT&T California (collectively "AT&T"), by its attorneys and pursuant to Section 76.1003(f) of the Commission's rules, 47 C.F.R. § 76.1003(f), hereby submits this Reply to the Answer of CoxCom, Inc. ("Cox").[1]

I. SUMMARY AND INTRODUCTION.

Cox's Answer does nothing to undermine the central contention at issue in this proceeding: that Cox engages in conduct that seriously reduces competition for video programming services in San Diego, to the detriment of consumers. Specifically, Cox has used

[1] By agreement with Cox and the Commission's Media Bureau, AT&T received an extension of time to file this Reply. *See* Letter from Dileep S. Srihari to Marlene H. Dortch, filed Nov. 6, 2008 in File No. CSR-8066-P.

its exclusive access to San Diego Padres games in a deliberate and, unfortunately, effective effort to preclude competition from AT&T and other non-cable providers. As a result, AT&T has been stymied in its efforts to offer a meaningful competitive alternative to San Diego consumers, and other competitors (like DBS) have made paltry inroads in San Diego as compared to the rest of the country. In short, Cox's conduct not only flies in the face of the policies of the Cable Act, which call for the promotion of competition and alternative distribution channels, but also violates the Act's plain language, by "hinder[ing] significantly" the competitive provision of satellite-delivered programming services—in direct contravention of Section 628(b).

In response to AT&T's Complaint, Cox's Answer sounds only one note: Cox contends that it is free to compromise and restrict competition in San Diego as it chooses, as long as the tool it uses to do so involves terrestrially-delivered programming. But the talisman of terrestrial delivery is not the all-powerful shield Cox would have the Commission believe. To be sure, the Commission's rules do not currently require vertically integrated programmers or operators to license any and all terrestrially-delivered programming, as they require with respect to satellite-delivered programming, nor does the Act specifically address terrestrially-delivered programming. Whether the Commission should regulate the licensing of such programming as a general matter is the subject of the Commission's ongoing rulemaking[2] and not this proceeding; as much as Cox insists otherwise, AT&T does not address that issue here. AT&T asserts simply that Section 628(b) generally empowers the Commission to police competition-deterring conduct that is specifically shown to hinder competition for video programming services, *regardless* of

2 *See* Report and Order and Notice of Proposed Rulemaking, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 17791, 17859-61 ¶¶ 115-117 (2007) ("*2007 Program Access Order*").

the nature of that conduct. That conduct may involve contracts for exclusive building access, as the Commission found in the *MDU Order*,[3] or, as here, it may involve abuse of an exclusive contract for "must-have" programming that happens to be terrestrially-delivered. Any other view would cramp the Commission's ability to protect video-programming competition to a degree wholly incompatible with the pro-competitive sweep of the Cable Act.

Cox's only other argument is that its withholding of Padres programming does not actually "hinder" AT&T in its ability to compete. But its various arguments in this regard hardly merit a response. Cox's suggestion that AT&T must be wholly prevented from competing in order to state a claim flies in the face of the plain language of the statute. Its implausible argument that AT&T could easily replace the Padres programming with some substitute programming is belied by Cox's aggressive promotion of the Padres games as a unique attribute of its own service. Cox similarly fails to discredit AT&T's internal market studies showing a significant impact on penetration and churn as a result of AT&T's inability to offer Padres programming. These informal studies simply confirm what the Commission has repeatedly found: that regional sports programming like that offered on Cox-4 is "must-have" programming whose absence seriously hinders competition. Indeed, that conclusion is further supported in this Reply by an additional, independent study that reaches the same result, after polling over 400 study participants. And finally, the notion that Cox is immune from this suit because the San Diego market has been found to offer the "effective competition" necessary to support rate deregulation is entirely inapposite to the question of whether Cox should be free to

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[3] Report and Order and Further Notice of Proposed Rulemaking, *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 20235 (2007) ("*MDU Order*").

squelch the entry that triggered that finding by withholding a key asset that all competitors need to get beyond the starting block.

II. SECTION 628 GIVES THE COMMISSION AMPLE AUTHORITY TO ADDRESS ANY CONDUCT THAT SIGNIFICANTLY HINDERS COMPETITION FOR SATELLITE-DELIVERED PROGRAMMING, INCLUDING ANTI-COMPETITIVE WITHHOLDING OF TERRESTRIALLY-DELIVERED PROGRAMMING.

A. Cox's Answer Is Based On A Fundamental Mischaracterization Of AT&T's Primary Argument.

Cox misses the mark in arguing that the Commission previously has concluded that its rules and Section 628 do not reach terrestrially-delivered programming, and in pointing to the pending program access rulemaking on the "terrestrial loophole" issue. AT&T is not seeking to litigate here the extent to which Section 628 of the Act reaches terrestrially-delivered programming as a general matter, or the extent to which the Commission can and should generally regulate the licensing of such programming under Sections 628(c) or (b). Instead, AT&T asserts only that Section 628(b) empowers the Commission to act in particular cases to police anti-competitive conduct that significantly hinders a competitor from offering satellite-delivered programming—whether that conduct involves exclusive contracts for multi-tenant dwelling units, or exclusive contracts for terrestrially-delivered programming, or some other unfair conduct. And *this* is one such case: AT&T has shown that Cox is deliberately and effectively interfering with AT&T's ability to provide a competitive video programming alternative in San Diego—thereby hindering its ability to offer satellite-delivered programming and suppressing competition for San Diego consumers. On *these* facts, Section 628(b) authorizes the Commission to act, and the fact that the anti-competitive conduct at issue involves terrestrially-delivered programming rather than some other conduct does not somehow undermine that authority.

Cox would clearly rather litigate about the straw man it has constructed than address the specific facts of this case. It accordingly spends an enormous amount of energy trying to prove the undisputed fact that the Commission has previously raised the "terrestrial loophole" as a limitation on its ability to regulate under Section 628, and it devotes considerable effort to demonstrating the even more obvious fact that Section 628 on its face references only "satellite-delivered programming." But these facts would be relevant only if AT&T were arguing that the withholding of terrestrially-delivered programming is unlawful in and of itself—even when it does not significantly hinder the provision of satellite-delivered programming. Whether or not that would be a permissible reading of the Act or a proper exercise of the Commission's authority, it is not a necessary finding for relief here. This case is, plainly and simply, about *satellite-delivered programming*—and Cox's efforts to stave off competition for delivery of such programming in the San Diego market. And on that basis, and in this case, Section 628(b) empowers the Commission to act, regardless of the nature of Cox's anti-competitive conduct.

B. The Commission's Prior Decisions Are Inconsistent With Cox's Reading Of Section 628.

Cox's next argument is that the Commission already has determined that Section 628(b) can *never* bar the withholding of terrestrially-delivered programming. That argument is plainly wrong—and the cramped reading of Section 628(b) it would require is inconsistent with the Commission's recent analysis in the *MDU Order*.

Cox argues that in *DirecTV*, *EchoStar*, and *RCN*, the Commission affirmed that Section 628(b) does not apply to anti-competitive conduct that involves terrestrially-delivered programming. Yet *in the very next sentence of its Answer,*[4] Cox concedes that these orders expressly state that Section 628(b) might reach the withholding of terrestrially-delivered programming, at least when a cable operator has shifted that programming from satellite delivery with the intent of "evading" the program access rules. *See, e.g.*, Memorandum Opinion and Order, *DirecTV, Inc. v. Comcast Corp.*, 15 FCC Rcd 22802, 22807 ¶¶ 11, 13 (2000) ("*DirecTV Commission Order*"). Thus, as even Cox appears to recognize, *DirecTV*, *EchoStar*, and *RCN* cannot possibly stand for the proposition that Section 628(b) can be violated *only* by the withholding of satellite-delivered programming. Rather, they reinforce the notion that the Commission can reach *any* programming if, on specific facts, the vertically integrated cable operator's conduct with respect to that programming is anti-competitive and has the effect of significantly hindering a competitor's delivery of satellite-delivered programming.

Indeed, nothing in these orders suggests that the Commission meant to foreclose the possibility that Section 628(b) could be used to redress the withholding of terrestrially-delivered programming in circumstances *other* than where a cable operator seeks to "evade" the program access rules. Cox focuses on language in all three Cable Services Bureau decisions stating: "In enacting Section 628, Congress determined that while cable operators *generally* must make available to competing MVPDs vertically-integrated programming that is satellite-delivered, they do not have a *similar obligation* with respect to programming that is terrestrially-delivered." Memorandum Opinion and Order, *DirecTV, Inc. v. Comcast Corp.*, 13 FCC Rcd 21822, 21837 ¶ 32 (1998) (emphasis added); Memorandum Opinion and Order, *EchoStar Commc'ns Corp. v. Comcast Corp.*, 14 FCC Rcd 2089, 2102 ¶ 28 (1999) (emphasis added); Memorandum Opinion

4 Answer 3; *see also id.* at 22-23.

and Order, *RCN Telecom Servs. of N.Y., Inc. v. Cablevision Systems Corp.*, 14 FCC Rcd 17093, 17105 ¶ 25 (1999) (emphasis added). But this quote merely states the uncontroversial proposition that there is no general requirement that cable operators share their terrestrially-delivered programming; it says nothing about whether there might be specific circumstances where a failure to share might be deemed to be anti-competitive conduct that precludes a competitor's ability to offer service. The same is true of the Bureau's statement in *RCN* that "we decline to find that, *standing alone*, Defendants' decision to deliver . . . programming terrestrially . . . and to deny that programming to Complainants is 'unfair' under Section 628(b)." *RCN*, 14 FCC Rcd at 17106 ¶ 25 (emphasis added). Again, here AT&T does not argue that Cox's withholding of Cox-4 is unfair *merely* because Cox has negotiated an exclusive contract for terrestrially-delivered programming—a showing that would be enough to make out a violation under Section 628(c) if the programming at issue were *satellite*-delivered. Rather, it is unfair because Cox's withholding of Cox-4 is intended to, and does, seriously threaten AT&T's ability to offer San Diego consumers meaningful competition.

Finally, numerous paragraphs in the *DirecTV*, *EchoStar*, and *RCN* orders make clear that the Commission's denial of relief was based on *factual grounds*, and not a broad holding that relief is never available for the withholding of terrestrially-delivered programming. *See, e.g.*, *DirecTV Commission Order*, 15 FCC Rcd at 22807 ¶ 13 ("[T]he facts alleged are not sufficient to constitute such a violation here."). And in contrast to the *DirecTV*, *EchoStar*, *and RCN* complainants, AT&T has submitted a great deal of evidence demonstrating that Cox's withholding of Padres programming is dramatically affecting AT&T's ability to compete in San Diego.

Cox nevertheless would have the Commission read these orders, as well as the *Everest* and *Dakota* orders, as foreclosing the Commission from addressing any conduct under Section 628(b) that is not otherwise made unlawful under the Act. Cox makes much of the Commission's statement that Section 628(b) "cannot be converted into a tool that, on a *per se* basis, precludes cable operators from exercising competitive choices that Congress deemed legitimate." Memorandum Opinion and Order, *Dakota Telecom, Inc. v. CBS Broad., Inc.*, 14 FCC Rcd 10500, 10507 ¶ 20 (1999). But the Act's *silence* on a particular practice does not suggest that Congress has "deemed" that conduct to be "legitimate"—as we discuss below. And Cox's reading would render Section 628(b) largely meaningless, since it would unnecessarily empower the Commission to police only conduct that some *other* provision of the Act already makes unlawful. This is not only contrary to fundamental principles of statutory construction,[5] it also would be an incredibly cramped view of the Commission's authority under the Act—one at odds with the broad pro-competitive policies that the Cable Act otherwise espouses. *See, e.g.*, 47 U.S.C. § 521(6) (Cable Act designed to "promote competition in cable communications"); *id.* § 548(a) (purpose of program access rules is to "increas[e] competition and diversity in the multichannel video programming market" and "to spur the development of communications technologies."). Indeed, *Dakota* itself observes that "Section 628(b) remains 'a clear repository of Commission jurisdiction to adopt additional rules or to take additional action to accomplish statutory objectives should additional types of conduct emerge as barriers to competition and

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[5] As the Supreme Court has repeatedly recognized, it is a "cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

obstacles to the broader distribution of satellite cable and broadcast programming.'" *Dakota*, 14 FCC Rcd at 10507 ¶ 20.

Finally, the Commission decisively resolved any lingering question on this issue in the *MDU Order*, in which it expressly rejected an argument almost identical to the one that Cox makes here. The *MDU Order* holds that Section 628(b) prohibits *any* type of anti-competitive behavior that significantly hinders the provision of satellite-delivered programming to customers—not just behavior that affects video providers' access to such satellite-delivered programming—and not just conduct that is expressly prohibited by some other provision of the Act. *See, e.g.*, *MDU Order*, 22 FCC Rcd at 20255-56 ¶¶ 43-44 & n.132.

Although Cox seeks to characterize the *MDU Order* as "easily distinguished and not relevant to this case,"[6] those efforts fail. Cox argues that the *MDU Order* "did not involve a denial of programming at all." Answer 4, 25. But it is hard to see how this helps Cox. If Section 628(b) can be violated by behavior that does not involve the withholding of *any* programming, surely it can reach conduct that *does* involve programming—as long as in each case, the *effect* of the conduct is to hinder delivery of *satellite*-delivered programming.

C. By The Same Token, Cox's "Statutory Construction" Of Section 628(b) Is Fundamentally Flawed.

Cox also contends that the text of Section 628(b), on its face, must be read as barring only actions that limit a video provider's *access to* satellite-delivered programming. *See, e.g.*, Answer 12. Under Cox's reading of the statute, even if a cable operator engages in conduct that significantly hinders another video provider's *delivery* of satellite-delivered programming *to*

[6] Answer 4.

customers, such conduct is lawful unless the cable operator *also* limits the other provider's *access to* satellite-delivered programming. Answer 13.

This reading of Section 628(b) is at odds with the statute's plain text. Section 628(b) says nothing about a competitor's ability to *access* programming; it focuses solely on whether the conduct at issue affects a competitor's ability to "*provid[e]* satellite cable programming." 47 U.S.C. § 548(b) (emphasis added). Moreover, the Commission already has rejected Cox's argument. As it found in the *MDU Order*, Section 628(b) reaches not only "practices that deny MVPDs access to programming," but also "any practices that unfairly deny MVPDs the ability to provide such programming to consumers." *MDU Order*, 22 FCC Rcd at 20256 ¶ 44. As the Commission noted, Congress knew how to draft statutory language aimed specifically at *access* to programming, as it did in Section 628(c); Congress could easily have done the same in Section 628(b), and it chose not to do so. *See id.*

In any event, Cox's preferred reading would render Section 628(b) pointless. Withholding satellite-delivered programming from an MVPD *necessarily* has the effect of significantly hindering the MVPD's provision of that satellite-delivered programming to consumers; under Cox's reading, the second half of Section 628(b) would become superfluous. Indeed, all of Section 628(b) would be superfluous, since it presumably would reach nothing more than what the rules required under Section 628(c) already address (*i.e.*, denial of access to satellite-delivered programming). But the plain text of Section 628(c)(2), entitled "Minimum Contents of Regulations," makes clear that Section 628(c) merely establishes a *floor* with respect to the rules that might be necessary to enforce Section 628(b), not a *ceiling*. Accordingly, Congress must have understood Section 628(b) to prohibit a broader range of conduct than that addressed by the "minimum" regulations required to implement that provision that are memorialized in Section 628(c). As the Commission has explained:

> [N]othing in these provisions [in 628(c)(2)] indicate that they were intended to establish the outer limits of the Commission's authority under Section 628(b). In fact, the very title of Section 628(c)(2), "Minimum Contents of Regulations," strongly suggests that the rules the Commission was required to implement had to cover the conduct described in Sections 628(c)(2) at the least, but that the Commission's authority under Section 628(b) was broader. This interpretation is confirmed by Section 628(c)(1), which grants the Commission wide latitude to "specify particular conduct that is prohibited by [Section 628(b)]."

MDU Order, 22 FCC Rcd at 20258 ¶ 48 (second alteration in original).

D. Nothing In The Cable Act's Legislative History Precludes The Application Of Section 628(b) To Terrestrially-Delivered Programming.

Cox next points to *Dakota*, where the Commission found that the defendant's exclusive contract for non-vertically integrated programming could not be "unfair" conduct actionable under Section 628(b) because Congress had *specifically* considered, and expressly decided to allow, such contracts. *See Dakota*, 14 FCC Rcd at 10507 ¶ 22 (explaining that "an exclusive contract [for non-vertically integrated programming] represents a practice that Congress examined and did not consider anticompetitive."); *see also id.* at 10505 ¶¶ 10-11. Cox argues that, based on this precedent, Section 628(b) cannot reach terrestrially-delivered programming because Congress specifically intended to *protect* exclusive contracts for such programming. But *Dakota* has no relevance here. Congress *did* expressly choose to address exclusive agreements only among *vertically integrated* entities, since this was the heart of its anti-competitive concern.[7] But there is no evidence whatsoever that Congress expressly sought to

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[7] *See, e.g.*, Cable Television Consumer Protection and Competition Act of 1992 § 2(a)(5), Pub. L. No. 102-385, 106 Stat. 1460 ("The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators

protect exclusive contracts for terrestrially-delivered programming.

To the contrary: it appears that Congress simply *did not consider the question at all.* While the final bill adopted included the phrase "satellite-delivered" to describe the programming at issue, this appears to have been (at most) merely descriptive: terrestrial delivery was rarely used at the time the statute was passed. Notably, Cox can cite no record of any discussion concerning the implication of adding the "satellite-delivered" modifier, and there is no indication that it was intended as a substantive limitation.

When Representative Tauzin offered the text of what would become Section 628 as a floor amendment, his statement of the problem did not confine it to any particular mode of delivery: he explained that those few companies "that control the program now have refused to sell that program to anybody else who would compete with cable."[8] And despite the limitation to "satellite-delivered" in his bill and the absence of that language in the Senate version of the bill, Tauzin described the latter as being "similar" to his own proposal, thus belying the notion that there was any sense that the Tauzin "modifier" had a substantive effect on the reach or impact of the legislation.[9]

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have the incentive and ability to favor their affiliated programmers. This could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems. Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies."); 138 CONG. REC. 19,149 (July 23, 1992) (statement of Rep. Tauzin) ("I think the problem can be stated very simply . . . . The cable industry, first of all, concentrated in some very large national companies, and it vertically integrated. It does not only own the cable in our homes now, it owns the programs that go over those cables.")

8 *Id.* at 19,149 (statement of Rep. Tauzin); *see also id.* at 19,152 (statement of Rep. Harris that "cable companies which also own programming cannot refuse to sell their programming to other distribution systems in order to choke off any competition").

9 *See id.* at 19,181.

In fact, during the debate on the 1992 Cable Act, not even the *cable companies* appear to have recognized that the inclusion or omission of the phrase "satellite-delivered" had any substantive import. Once the Tauzin Amendment was introduced, a substitute proposal was immediately offered on behalf of the cable companies by Representative Manton.[10] The Manton substitute—described as being "drafted by the cable companies for the cable companies"[11]—would have significantly weakened the Tauzin proposal in many ways—but it notably did *not* include the language restricting the rules to "satellite-delivered" programming only.[12] In short, and contrary to Cox's creative reading of the legislative history, there is no evidence from which to conclude that the acceptance of the Tauzin language over other versions of the legislation indicated an affirmative desire by Congress to protect terrestrially-delivered programming from the law's reach. As the courts have made clear, a mere difference in the final language of a bill from an earlier version is accorded no weight at all in the absence of any indication that the change was deliberate or any evidence as to its significance to the decision makers.[13]

In any event, the legislative history makes clear that, in adopting Section 628, Congress granted the Commission broad authority to address "unreasonable" cable industry practices and promote facilities-based competition to cable.[14] The section of the Conference Committee Report addressing that provision states broadly that, in adopting rules under Section 628, the

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10 *See id.* at 19,178-92 (debate on Manton substitute).

11 *See id.* at 19,149 (remarks of Rep. Tauzin).

12 *See id.* at 19,179-81.

13 *See, e.g.*, *Sash v. Zenk*, 428 F.3d 132, 138 (2d Cir. 2005) ("The appearance of a provision in an earlier version of a law is not itself evidence for or against any particular reading unless we know *why* Congress omitted it in subsequent versions.") (emphasis in original).

14 H.R. Conf. Rep. No. 102-862, 1992 U.S.C.C.A.N. 1231, 1275 (1992).

conferees "expect the Commission to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies," and "intend . . . the Commission [to] encourage arrangements which promote the development of new technologies providing facilities-based competition to cable."[15] Nothing therein suggests that Congress intended to categorically exclude terrestrially-delivered programming from the ambit of that section, as Cox contends.

Cox is also wrong that Congress's failure to close the "terrestrial loophole" in recent years is a basis for the Commission to conclude that Congress has "blessed" the notion that the Commission may not reach terrestrially-delivered programming under Section 628(b). The two issues are unrelated, as AT&T has explained: closing the so-called "terrestrial loophole" generally is not a prerequisite to the relief AT&T seeks here or to the Commission's authority to grant that relief. Section 628(b) on its face already grants the Commission the authority it needs to reach terrestrially-delivered programming in at least some circumstances—as the very cases Cox cites indicate. And no Congressional amendment is necessary to support that reading—any more than a Congressional amendment was necessary to support the Commission's authority to adopt the *MDU Order*. It is hard to see how Congress's failure to adopt an amendment to give the Commission authority that the Act already gives it demonstrates Congress's belief that the Commission *lacks* that authority.

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15 *Id.*

E. The Fact That Some Exclusive Contracts Are Pro-Competitive Does Not Change The Fact That Cox's Exclusive Dealing With Respect To Cox-4 Is Not.

Cox contends that AT&T can hardly deem exclusive contracts "unfair" within the meaning of Section 628(b) when AT&T itself engages in certain exclusive arrangements. Answer 5-6, 36-38. But AT&T does not contend that *all* exclusive arrangements are unlawful or that such agreements can never have pro-competitive effects—any more than Congress did when it enacted Section 628. As noted above, and as the *Dakota* case confirms, the harm Congress sought to remedy was anti-competitive behavior by *vertically integrated* programmers that have an incentive to favor affiliates in order to drive competitors out of the market. Essentially, Congress sought to ensure that exclusive programming arrangements would be available to any video provider willing to compete for them, and not merely to affiliated cable providers willing to forego short-term programming revenues in order to reap long-term monopoly profits. Cox's exclusive hold on Cox-4 programming is being used by Cox for precisely that purpose—to undermine AT&T's ability to compete in the San Diego market.

In any event, the other exclusive agreements to which Cox points—concerning the iPhone, certain mobile programming, and DirecTV's "Sunday Ticket" offering[16]—are not comparable. None is an exclusive agreement between affiliated entities, and none involves an essential input, the lack of which threatens to drive competitors from the market. Moreover, the programming agreements Cox references do not actually give AT&T *exclusive* access to any

[16] The "Sunday Ticket" package to which Cox refers is an agreement between DirecTV and the NFL. AT&T is not a party to that agreement and had no role in negotiating it. Although AT&T conceivably will receive some benefit from that arrangement given its recent announcement that it intends to resell DirecTV service in markets where it has not yet rolled out U-verse television, Cox's attempt to tie AT&T to the "Sunday Ticket" agreement is feeble, at best.

programming. The NFL games covered by the "Sunday Ticket" DirecTV agreement are not exclusively available over DirecTV: they can be seen *individually* by customers in their home markets over regular broadcast and/or cable television, and local customers can always view a selection of out-of-market games. Likewise, whatever rights AT&T may have to display programming such as Sony movies, CNN content, March Madness basketball, or Olympics coverage over its mobile platform, the programming at issue is available in its original, preferred format on a range of *non-mobile* platforms—cable, broadcast television, the Internet, and the like. And in any event, the AT&T mobile content is not remotely critical to competition in the wireless arena. Wireless is highly competitive as a general matter, with no dominant incumbent. Furthermore, in contrast to the cable market, wireless video is still nascent, so there is no preconceived notion of "must have" programming over that platform. Carriers are all feeling their way forward with various offerings.

Moreover, the iPhone is an exclusive contract for a limited period of time in a fiercely competitive market in which consumers can choose from dozens of other handset models. In stark contrast to regional sports network programming, access to the iPhone is not a prerequisite to providing meaningful wireless competition in markets in which AT&T competes; AT&T faces genuine competition from carriers that have access to their own advanced handsets with cutting-edge capabilities,[17] and the evidence suggests that the iPhone has had a minimal effect on wireless competition in such markets. Although the iPhone has been well-received and has

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17 *See, e.g.*, Matt Marrone, *Review: Google G1 cell phone from T-Mobile squares off against Apple's iPhone, BlackBerry*, http://www.nydailynews.com/money/2008/11/06/2008-11-06_review_google_g1_cell_phone_from_tmobile.html; Robert Holmes, *Verizon Wireless to Sell Storm at iPhone Price*; http://www.thestreet.com/story/10447702/1/verizon-wireless-to-sell-storm-at-iphone-price.html?puc=googlen&cm_ven=GOOGLEN&cm_cat=FREE&cm_ite=NA.